IN THE MATTER OF a Board of Inquiry

appointed pursuant to s.38(1) of the

Human Rights Code, R.S.O. 1990, c.H.19

BETWEEN

MIKE NARAINE

Complainant

- and -

FORD MOTOR COMPANY OF CANADA LTD.,

GORD BATSTONE, GEORGE GOYTON, ANDY BARR, W.H. DOBSON,

BOB DARROGON AND MIKE TEIGHE

Respondents

Date of Complaints: 24 May 1985 and 24 October 1985

Date of Decision: February 13, 1995

Board of Inquiry: Professor Constance Backhouse

Counsel: Counsel for the Commission, Naomi Overend

Counsel for the Complainant, Michael McFadden

Counsel for the Respondents, Russell Juriansz

Mr. Juriansz, counsel for the Respondents, brought a motion for an order that the doctrine of issue estoppel should apply to this human rights proceeding. The complaint involves a claim by Mike Naraine that his right to equal treatment with respect to employment has been infringed because of his race, colour, place of origin and ethnic origin, contrary to section 4(1), 4(2), 7, 8 and 10 of The Human Rights Code, R.S.O. 1990, c.H.19. The motion for issue estoppel involves a prior proceeding before a board of labour arbitration, Ford Motor Company of Canada Limited v. International Union, U.A.W., Local 200 (Arbitrator, E.E. Palmer, Q.C., 3 April 1986), which considered grievances filed by Mr. Naraine relating to his several suspensions and discharge from Ford. The collective agreement governing the grievances contained a "no-discrimination clause," prohibiting discrimination against any employee "on account of race, creed, colour, nationality, age, sex, ancestry, or place of origin." Mr. Juriansz contended that the findings contained in the arbitration award issued by Professor Palmer, dismissing two of the three grievances and holding that the Respondent was justified in dismissing the Complainant, ought to bind this tribunal. In the alternative, Mr. Juriansz argued that the findings of fact made by the arbitrator concerning the Complainant's assault upon a fellow employee ought to be binding upon this tribunal.

The doctrines of res judicata and issue estoppel are based upon important policy objectives: the desire to avoid duplicative litigation, inconsistent results, undue costs, and inconclusive proceedings. However, there are several specific preconditions necessary before the doctrine of res judicata will apply. Sopinka and Lederman in The Law of Evidence in Civil Cases, lists the following:

> i) that the alleged judicial decision was what in law is deemed as such;
>
> ii) that the particular judicial decision relied upon was in fact pronounced, as alleged;
>
> iii) that the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf;
>
> iv) that the judicial decision was final;
>
> v) that the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised;
>
> vi) that the parties to the judicial decision, or their privies, were the same persons as the parties to the proceeding in which the estoppel is raised, or their privies, or that the decision was conclusive in rem.

The key points of concern here relate to the last two matters listed: the identity of legal questions, and the identity of the parties.

The legal question before the board of arbitration was whether Ford was justified in terminating Mr. Naraine pursuant to the collective agreement. The legal question before this human rights tribunal is whether Ford violated any provisions of the provincial human rights statute. A long line of human rights cases has established that there is no identity of issue between

labour arbitration and human rights matters, even where the proceedings arise out of the same factual circumstances, and even where the arbitration purports to consider matters of human rights and discrimination. The two systems of dispute resolution differ dramatically in their legislative foundation, goals, purposes, function, process and remedial capacity. Similarly, there is no identity of parties in the two proceedings. The labour arbitration was a dispute between the corporate respondent and the union. The parties to this complaint are quite different. Instead of the union, we now have the Ontario Human Rights Commission and Mr. Naraine. Instead of a single corporate respondent, as there was in the arbitration, this case names several individual respondents along with the corporate respondent. Virtually all previous case law has held the distinction in parties to be fatal to claims for issue estoppel. Detailed analysis regarding the inapplicability of issue estoppel can be found in cases such as Derksen v. Flyer Industries (1977), unreported (Man. Bd. of Inquiry); Abihsira v. Arvin Automotive of Canada, Limited (1980), 2 C.H.R.R. D/271 (Ont. Bd. of Inquiry); Hyman v. Southam Murray Printing Division (1981), 3 C.H.R.R. D/617 (Ont. Bd. of Inquiry); Fleming v. Byron Jackson Division, Borg-Warner (Canada) Ltd. (1982), 3 C.H.R.R. D/765 (Ont. Bd. of Inquiry); Dennis v. Family and Children's Services (1990), 12 C.H.R.R. D/285 (Ont. Bd. of Inquiry).

Mr. Juriansz frankly conceded that the board of inquiry jurisprudence regarding issue estoppel was contrary to the

position he was taking. However, he argued that this board of inquiry should depart from the established authorities in light of Rasanen v. Rosemount Instruments Ltd. (1994), 17 O.R. (3d) 267 (C.A.). This case involved an employee who sought compensation for termination through two separate proceedings: from an employment standards referee under the Employment Standards Act and from the courts under wrongful dismissal law. The employment standards referee held that there was no entitlement to termination pay because the employee had refused reasonable alternate work. The majority of the Ontario Court of Appeal ruled that this finding precluded the employee from seeking damages for wrongful dismissal under common law. (Carthy, J.A., in dissent, held that it would be unfair to invoke issue estoppel in the wrongful dismissal action in light of the limited relief and summary procedures of the Employment Standards Act).

In my view, the ruling in Rasanen is not sufficient to justify departing from the long line of jurisprudence rejecting the doctrine of issue estoppel in human rights cases. The majority of the court in Rasanen concluded that the issues in the employment standards and wrongful dismissal cases were the same: was there any entitlement to compensation arising from the termination of employment. Mr. Juriansz attempted to characterize the present case in similar terms, arguing that the issue here was whether Mr. Naraine should be reinstated, and whether Ford was justified in terminating his employment. These may have been the issues before the labour arbitrator, but the

human rights process is not equally confined to the narrow focus on termination and reinstatement. It is possible that this hearing may involve evidence and argument relating to the workplace environment which go beyond the facts resulting in the discharge of the specific complainant. The purpose of this board of inquiry is to determine whether there has been discrimination amounting to a violation of the Human Rights Code, and if so, what remedial order is required to rectify this.

In Rasanen the majority held that there was mutuality (if not identity) in the parties to the two proceedings. The Employment Standards Branch of the Ministry of Labour, not the employee, was the named party to the employment standards proceedings. However, Abella, J.A. ruled that there was a "clear community of interest" between the employee and the Ministry of Labour, sufficient to characterize the employee as "a party or privy." She noted:

> It was a hearing resulting from a claim he [the employee] initiated. He participated in the two stages which preceded a referee hearing under the Employment Standards Act - the initial investigation and the officer's review of the investigation. The Ministry of Labour, through counsel, appeared on the appellant's behalf for the purpose of promoting his claim and defending the officer's decision in his favour. He not only had notice of every step of the process and hearing, he was present at the hearing, gave evidence, heard the evidence and argument of all parties, and submitted or reviewed the relevant documentation filed.
>
> [...]
>
> The appellant clearly called the witnesses he wanted, introduced the relevant evidence he needed, and had the chance to respond to the evidence and arguments against him. He had the assistance of counsel provided by the Minister of Labour and there was no evidence that he sought his own counsel or that his choice would have

> been denied if sought. He enjoyed, in short, the full benefits that an official "party" designation would have provided....
>
> [at 282-3.]

It is unclear to what extent this analysis might be applicable to the claim of "mutuality of parties" between Mr. Naraine and the union. It is indisputable, however, that the reasoning does not apply to the Human Rights Commission and the union. There was no evidence before me to suggest that the Human Rights Commission had any involvement whatsoever in the labour arbitration. Nor is it obvious that there is necessarily a mutuality of interest between the Commission and the individual complainant. The Commission is a publicly appointed body, charged with the enforcement of the Code in the public interest. There are many occasions in which the public interest mandate of the Commission may diverge from the private and individual concerns of the complainant. Consequently, the decision of Abella, J.A. in Rasanen is inapplicable to the present case.

A review of the actual decision from the labour arbitration provides additional evidence that issue estoppel is not warranted in this case. The award considers the employment history of the Complainant from an industrial relations perspective. There is no reference to the "no-discrimination clause" of the collective agreement. There is no indication that there were any arguments made before the arbitrator concerning racial discrimination. If the arguments were made, there is no indication that the arbitrator put his mind to the issues. There is no reference to the Human Rights Code, nor to any human rights jurisprudence

regarding racial discrimination. Various passages in the arbitration award involve questions of credibility which may prove central to the issues in dispute before this board. In some of these passages, the arbitrator indicates that he is declining to make findings of fact because he is of the view that the evidence is irrelevant to the labour law issues before him.

In his final argument, Mr. Juriansz requested that even if the preconditions for issue estoppel had not been made out, this board should decline to proceed with its inquiry. The duplication in litigation was, he argued, an abuse of process. For all the reasons indicated above, I disagree.

In conclusion, then, this board must reject Mr. Juriansz' motion that this board is bound by the findings and determinations of the board of arbitration based on issue estoppel. The better course is to proceed with the hearing into the merits, giving due consideration to the previous arbitration award as seems appropriate in light of all the evidence adduced. The arbitration decision is not conclusive at the outset. The weight to be accorded to any earlier arbitration findings is something which must be assessed against all of the evidence adduced during our hearing.

February 13, 1995

Date

Constance Backhouse
Chair, Board of Inquiry